FILED
APR 13 1994
OFFICE OF THE CLERK

No. 93-1131

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEL KIDD AND JUDY KIDD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978, as amended, precludes petitioners from suing under the Federal Tort Claims Act for damages relating to an adverse personnel action.

2. Whether the court of appeals properly held that the district court did not abuse its discretion in refusing leave to amend petitioners' complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported, but the judgment is noted at 8 F.3d 27 (Table). The opinion of the district court (Pet. App. A6-A8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered October 7, 1993. The petition for a writ of certiorari was filed January 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Del Kidd is an employee of the Bureau of Reclamation, an agency of the Department of the Interior. Pet. App. A2.[1] He asserted personnel grievances against his supervisors in 1989 and 1990. Pet. 4 n.3. He first attempted to obtain redress for those grievances through processes established by the Civil Service Reform Act of 1978 (CSRA), but the administrative proceedings within the Department of the Interior did not yield a resolution satisfactory to petitioner. Nor was petitioner satisfied with the resolution of the complaints he filed with the Office of Special Counsel. Pet. 10-11, 13-14.[2] Finally, petitioner was also unsuccessful in his attempt to obtain relief from the Merit Systems Protection Board under the Whistleblower Act. See *Kidd* v. *Department of Interior*, 5 F.3d 1502 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994).

2. On July 12, 1991, petitioner filed a complaint against the United States in the United States District Court for the District of Nevada. The complaint alleged

[1] Although Judy Kidd is named as a petitioner and is listed in the caption of the complaint, the only plaintiff named in the body of the complaint is Del Kidd (C.A. Record Excerpt, Tab 1, at 1 ¶ 1). And because it is clear from the petition (Pet. 4-7) that the case derives entirely from Del Kidd's personnel complaints and that Judy Kidd has no claim that is not derivative of his (assuming she makes any claim in this case at all) we will henceforth refer only to petitioner Del Kidd.

[2] Petitioner has challenged the Office of Special Counsel's alleged failure properly to investigate his charges (Pet. 14 n.15) in another lawsuit. *Kidd* v. *United States*, No. CV-S-92-583-LDG (RLH) (D. Nev. Oct. 18, 1993), appeal pending, No. 93-17336 (9th Cir.). The district court concluded in that case that there was "ample evidence that the OSC made a reasonable investigation into [petitioner's] allegations." Slip op. 5.

constitutional and common-law tort claims for defamation, negligence, deprivation of due process, intentional infliction of mental distress, abuse of authority, and civil conspiracy arising out of Del Kidd's employment and the handling of the three grievances he filed against the Bureau of Reclamation. Pet. 4 & n.3. Petitioner later moved to amend the complaint to assert claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against 17 individuals, including Del Kidd's supervisors and the Secretary of the Interior.

The district court dismissed the action, finding that the Civil Service Reform Act "so occupied the fi[el]d of federal employee/employer relations" as to preclude tort-based remedies. Pet. App. A7. The court also denied leave to amend the complaint to assert *Bivens* claims against Del Kidd's supervisors and others. Because the CSRA precludes *Bivens* claims against a federal employee's supervisor for employment-related matters, the court held, amendment of the complaint would be futile. *Ibid.*

3. The court of appeals affirmed. Relying on *Rivera* v. *United States*, 924 F.2d 948, 951-952 (9th Cir. 1991), the court held that the district court properly dismissed the com-plaint to the extent it sought to allege claims under the Federal Tort Claims Act (FTCA), because the CSRA provides the exclusive remedy for federal civil service employees who allege claims arising out of their employment. Pet. App. A3. Relying on *Saul* v. *United States*, 928 F.2d 829, 835-843 (9th Cir. 1991), the court also concluded that the CSRA precludes constitutional tort claims against individual defendants under *Bivens*, and that it was therefore appropriate for the district court to refuse leave to amend the complaint to add such claims. Pet. App. A4-A5.

ARGUMENT

The court of appeals' decision holding that the CSRA precludes petitioner's claims based on the FTCA and *Bivens* is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The CSRA "'comprehensively overhauled the civil service system,' creating an elaborate 'new framework for evaluating adverse personnel actions against [federal employees].'" *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (citation omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. As this Court has recognized, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444, 445.

In light of those purposes, the Court in *Fausto* held that Congress intended the remedial scheme of the CSRA to preclude other remedies previously possessed by federal employees with respect to adverse personnel actions. Specifically, the Court in *Fausto* held that the CSRA's administrative and judicial review provisions precluded a federal employee from seeking judicial review of an adverse personnel decision in the former Claims Court under the Back Pay Act, 5 U.S.C. 5596(b)(1). *Fausto*, 484 U.S. at 454-455.

The courts of appeals have consistently applied *Fausto* to hold that the CSRA's remedial scheme precludes

other avenues of relief for personnel actions relating to federal employees.[3] Of specific pertinence here, the courts of appeals have uniformly determined that federal employees who have been the subjects of adverse personnel actions may not obtain judicial review through damage actions under the FTCA. See, *e.g.*, *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991); *Rollins* v. *Marsh*, 937 F.2d 134, 139-140 (5th Cir. 1991); *Rivera*, 924 F.2d at 951-952; see also *Schrachta* v. *Curtis*, 752 F.2d 1257, 1260 (7th Cir. 1985) ("the detailed administrative framework established by the Act convinces us, as it has other courts, that Congress intended the remedies provided by the CSRA to be the exclusive means to remedy violations of the Act's substantive provisions"); *Premachandra* v. *United States*, 739 F.2d 392, 394 (8th Cir. 1984) (pre-*Fausto* decision holding that the civil service laws "determined which consequential harms ought to be recompensed"); *American Postal Workers Union* v. *United States Postal Service*, 940 F.2d 704, 708-709 (D.C. Cir. 1991) (Postal Reorganization Act, which incorporates elements of the CSRA, precludes FTCA claims). In light of the uniformity of circuit authority, "[t]here is no longer any serious dispute that the CSRA preempts challenges to personnel actions brought under federal law." *Berrios* v. *Department of Army*, 884 F.2d 28, 30 (1st Cir. 1989). Petitioner has not cited, and we are unaware of, any court of appeals deci-

[3] For example, the courts of appeals have held that a federal employee may not seek judicial review of an adverse personnel action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, or through a writ of mandamus. See, *e.g.*, *McAuliffe* v. *Rice*, 966 F.2d 979, 980-981 (5th Cir. 1992) (APA); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.) (APA and mandamus), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 202-205 (6th Cir. 1990) (same).

sion recognizing a cause of action under the FTCA in the context of an adverse federal personnel action.[4]

Petitioner argues that he should not be barred from suing under the FTCA, because the CSRA did not give him an effective remedy as a result of a "conspiracy" on the part of his supervisors to subvert the protections of the CSRA. Pet. 11-12. But to recognize such an exception to the general rule would defeat Congress's purpose to channel "grievances and disputes arising out of government employment into a single system of administrative procedures and remedies," *Rollins*, 937 F.2d at 139, quoting *Rivera*, 924 F.2d at 951, since there will rarely be a case that cannot be recast to allege a "failure" of the CSRA system. Petitioner's essential claim is that the Special Counsel's office did not "do[] its job." Pet. 15. That petitioner was not satisfied with the result of the procedures prescribed by the CSRA, however, is not a reason to imply a parallel system of review for employment claims that was not envisioned by Congress.

2. Petitioner also renews his claim that the CSRA does not preclude assertion of constitutional tort claims under *Bivens*. The district court correctly denied petitioner leave to amend the complaint to add *Bivens* claims, because the CSRA precludes *Bivens* actions for alleged violations of constitutional rights in connection with federal employment.

In *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983), this Court held that the CSRA precludes federal jurisdiction over a

[4] The Sixth Circuit has reserved the question whether the CSRA precludes an FTCA action by a federal employee for damages related to an adverse personnel action. *McDaniel* v. *United States*, 970 F.2d 194, 198 (1992) (per curiam). The Tenth Circuit has noted the possibility that a tort claim sufficiently distinct from an adverse personnel action may be brought under the FTCA. *Petrini* v. *Howard*, 918 F.2d 1482, 1485 (1990) (per curiam).

federal employee's *Bivens* suits. The Court observed that *Bivens* itself cautioned against allowing a new damages remedy against federal officials where there are "special factors counselling hesitation," 462 U.S. at 375, or where there is an "explicit congressional declaration" that the injured parties should be "remitted to another remedy, equally effective in the view of Congress." *Id.* at 376. The Court then found that the "elaborate remedial system that has been constructed [in the CSRA] step by step, with careful attention to conflicting policy considerations," *id.* at 388, constituted a "special factor" counselling against creation of a new remedy, and concluded that a *Bivens* claim for damages for actions taken by the plaintiff's supervisor was precluded. In *Schweiker* v. *Chilicky*, 487 U.S. 412, 428-429 (1988), the Court extended the holding of *Bush* to foreclose *Bivens* suits even where the statutory remedy is incomplete. See also *Bush*, 462 U.S. at 388.

The lower courts have uniformly followed *Bush* and *Chilicky* in holding that *Bivens* actions arising out of federal employment are precluded. *Saul*, 928 F.2d at 840 (no *Bivens* remedy for allegedly unconstitutional opening of mail received at office); *Berry* v. *Hollander*, 925 F.2d 311, 314 (9th Cir. 1991) (no *Bivens* remedies for alleged due process and First Amendment violations allegedly committed to force plaintiff from his job); *Berrios*, 884 F.2d at 31 (due process); *Hill* v. *Department of Air Force*, 884 F.2d 1318, 1321 (10th Cir. 1989) (no *Bivens* action for alleged due process violations that constitute prohibited personnel practices), cert. denied, 495 U.S. 947 (1990); *Karamanos* v. *Egger*, 882 F.2d 447, 452 (9th Cir. 1989) (no *Bivens* remedy for alleged First Amendment violations); *Volk* v. *Hobson*, 866 F.2d 1398, 1403-1404 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989) (due process). Petitioner cites no contrary authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994